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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF MORRIS L. ERNST
Amicus Curiae

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Interest of the *Amicus*

For more than 40 years at the bar I have had the great good fortune to be involved in First Amendment causes. In the writing of books and articles, more than I now like to recall, I have had a deep and satisfying concern with the problems of censorship over the mind of man.

I surmise that such enjoyed dedication to this important sphere of the law prompted the Solicitor General to give permission to the filing of this brief—in opposition, I assume, to what may be his own position. I express here my gratitude together with a hope that this brief may be of some slight aid to the Court. I speak only my own mind and not that of any other person or group.

Summary of the Argument

The First Amendment must be construed in the light of its historical development if we are constitutionally to resolve the problems which have arisen in connection with the attempted regulation of freedom of speech and press. In that light, we must now recognize that there are three different areas of ideas which claim Constitutional protection. Of these, the Federal Government has the power to regulate the two groups which embrace seditious words and "merchandise words," respectively. But the third group, which is here termed that of Ideas *qua* Ideas, consists of those ideas which have as their purpose purely their impact on the mind of man; and it is this last group which carves out an area in the realm of ideas which the First Amendment places beyond the power of the National Government.

This construction of the First Amendment is in accord with the fundamental concepts underlying the Ninth and Tenth Amendments by which there was reserved to the States the regulation of the morals of the community. The absence of centrally decreed uniformity in this area of folkways and morals is vital to the preservation of Federalism in this Republic.

The history of the Constitutional Convention, of the Bill of Rights and of proposals debated in the earlier Congresses makes it abundantly clear that it was not the intent to grant to the central government by way of the postal, commerce or importation powers legislative authority in those areas reserved implicitly in the original Constitution and explicitly by the First, Ninth and Tenth Amendments to the States. The statute here involved bears witness to the fulfillment of the prophetic fear that the Congress will

seize upon these powers to base claims to those reserved powers of the states.

The only qualification which may be imposed on the power of the states over speech and press in the areas of Ideas *qua* Ideas is that which is ordained by the 14th Amendment.

"Obscenity" being a word incapable of precise definition and dependent in any particular situation upon an infinity of variables cannot serve as a Constitutional basis for predicating criminal liability. The Fifth Amendment forbids this.

The evil aimed at is unclear; proof of the causal relationship between the material protected by the First Amendment and the supposed evil does not exist at this moment of our history.

POINT I

Although originally the First Amendment forbade the abridgement of all speech and press, we must now recognize that the ideas underlying the First Amendment fall into three distinct and separate categories.

Freedom for all material that goes to the mind of man is a concept historically impressive. Yet few would deny that our present Constitutional attitudes concerning this concept are less than precise. Since the days of the Founding Fathers, totally new pressures on the Republic have arisen and have compounded the imprecision of the concept.

It is my thought that the resolution of the present Constitutional confusions and dilemmas may be assisted by examination of the distinctions between the three streams of ideas with which the freedoms of speech and

press are presently concerned. I suggest that Constitutional history indicates that a clarification is now necessary in terms of the distinctions between that speech and press which affect, in one sector, the preservation of governmental sovereignty; that in a second sector, trade and commerce in Things; and that in a third sector, ideas *qua* ideas.

The goodness or badness of ideas in this last sector can be tested only over the ages, and on such a gamble do we predicate our way of life.

Man has ever had a fear of ideas. The first clearly pronounced target was blasphemy during the early ages. Then, as the power shifted from the church to the state and from clergy to kings, the threat of the fearful became fixated upon sedition. Thereafter followed the Industrial Revolution and the Distributive Revolution, the latter utilizing words and ideas as auxiliaries to merchandise; and the Court found it constitutional to abridge the speech and press employed to solicit and to sell. The last target of the censorious, first attacked in England around 1860 and in our land around 1870, is obscenity in printed materials, accompanied by presumed dangers of anti-social sexual behavior.

The first area, in which censorship was born, that of blasphemy, is no longer significant, for the Government does not undertake to punish blasphemy, nor does it undertake to define what blasphemy might be. Neither are the states permitted to legislate test acts founded upon the criteria of blasphemy. Cf. *Burstyn* v. *Wilson*, 343 U. S. 495 (1952).

But in three other areas into which I am persuaded speech and the flow of the press have by force of history become divided, Government has undertaken to regulate the words which may be promulgated and received by the

public. I suggest that in two of these areas regulation may be constitutionally proper while in the third area it is absolutely prohibited. Without violating the First Amendment, the Government may justifiably permit abridgement of freedom of speech and press in the area of sedition and in the area of "merchandise words," but the Government may not without violating that Amendment abridge freedom of speech or press in the third area, of which "obscenity" (along with scandal, sadism, etc.) is a part. The distinctions between these various areas are distinctions of substance. It is this last area which is involved in the instant case. Here the First Amendment must be literally rendered: no abridgement is tolerable.

(a) In the area of seditious words, the Government has the power to abridge freedom of speech and press.

This first sector is comprised of ideas of sedition, those ideas that have impact on the very sovereignty of the Republic. It would be absurd to plead that our sovereign Republic is legislatively impotent to protect itself from attack. The constitutional concern in this area has shifted from that of the *existence of a power* to that of the *selection of the criteria* to be applied in the balancing, on a risk-for-risk basis, of individual freedom against national continuance. See, e.g., *Dennis* v. *United States*, 341 U. S. 494 (1951).

It is irrelevant in this brief to indicate more than that the outer limits of freedom of speech and press might better be tested by a standard more objective than the Holmes slogan of clear and present danger (always clear to the frightened, never present to the brave!), enunciated in *Schenck* v. *United States*, 249 U. S. 47 (1919). Rather does the Brandeis formula—is there time to make answer,

or in the alternative, time to call the police—insist on greater objectivity by judge or jury before the killing of ideas:

> "* * * [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Brandeis, J., concurring in *Whitney* v. *California*, 274 U. S. 357, 377 (1927). See also Ernst and Katz, "Speech: Public and Private," 53 Col. L.R. 620 (1953).

(b) In the area of "merchandise words," the Government has the power to abridge freedom of speech and press.

The second sector of idea content which can be segregated from the instant case is that which concerns "merchandise words." It is an area not yet born in 1791, when our largest library was 4,000 books and we had only 100 newspapers. "Merchandise words" are words which promulgate ideas, yes, but ideas only in order to sell lottery tickets, stocks, bonds, drugs, liquor or any other Thing or Things. This includes shoes, ships, sealing wax and cabbages—but not Kings. Merchandise words are merely tools of things and do not have as their sole or prime target the mere impact on the mind of man. These are, rather, the words of commerce, the exchange between buyer and seller, the *quid pro quo*, the bargain and sale, the offer and acceptance:

There is no question but that the Federal government may pass legislation governing the use of merchandise

words in commercial or trade activities involving commerce or the mails. See, e.g., *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U.S. 419 (1937).

(c) But in the area of ideas *qua* ideas, the Government may not abridge freedom of speech and press.

It is in the third sector of idea content that the First Amendment proscribes the abridgement of freedom of speech and press. This third sector is the sacred area of 'ideas for ideas' sake.' This is the area of words which have as their real objective their ultimate resting place in the restless mind of man—that instrument made sacred in constitutional terms by the First Amendment.

A sentiment may seem constitutionally relevant that our daily press is breeding a race of tasteless people to whom tawdry personal relations and sadism are made to seem normal. But the question in constitutional terms can never be one of decency or taste. Forces other than law exist in our culture to develop that degree of inner security which will minimize the need for vicarious tawdry living. I suggest that much of the distortion in legal constitutional thinking arises from the failure of the judicial stream to isolate this sector from the other two.

In this area we have not the Thing but the idea; not the package but the medium; not the paper, the ink, the binding, the film, but the thought. It is the thought, the idea—educational or entertaining—which, good or bad as judged by the whims of a passing generation, is the *res* of this area. We are not here concerned with the collateral paper or binding which is merely employed for the transmission of the constitutionally protected ideas of man.

Over the decades this Court will no doubt have to draw lines a little to the right or a little to the left to demark the

words which the Government may regulate from those words which are not seditious words, which are not merchandise words, but which are words which represent ideas *qua* ideas. Indeed since *Near v. Minnesota*, 283 U.S. 697 (1931), this Court, over a span of 26 years, has employed dicta in various cases in an effort to pinprick the frontiers of this sector. I submit that the Court might take the instant opportunity to further define these all-important frontiers.

In light of the above, I now proceed to the sacred area which the Constitution removes from National Governmental power.

POINT II

Section 1461 of Title 18 of the United States Code, 62 Stat. 768, 69 Stat. 183, invades the reserved powers of the States in violation of the First, Ninth and Tenth Amendments.

The statute here under attack, Sec. 1461 of Title 18 of the United States Code, must be read in the context of two parallel statutes, Sec. 1462 of the same Title and Sec. 1305 of Title 19. Section 1461 of Title 18 of the United States Code, in pertinent part, provides:

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character; * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding

in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 1462 of Title 18 of the United States Code, in pertinent part, provides:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly deposits with any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; * * *

"Whoever knowingly takes from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 1305 of Title 19, in pertinent part provides:

"All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast instrument, or other article, which is obscene or immoral * * *

"(P)rovided further, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes."

In the main, Section 1462 of Title 18 prohibits the interstate transportation by common carrier of the same matter

of which Sec. 1461 of that Title prohibits the mailing and of which Sec. 1305 of Title 19 prohibits the importation. The effect of these sections is pervasive regulation by the Federal government of the permissible content of printed communication (written or pictorial) in the area under review. A network of Federal law thus abridges the freedom of the people to communicate, not only across state or national boundaries but also—since Section 1461 applies to both intra- and inter-state mailing—within the boundaries of a single state.

Has the Federal Government—a government of delegated and enumerated powers only—the constitutional authority thus to restrict the rights of speech and press? It is submitted that there is no such Federal authority.

(a) The Constitution delegates no power to the Federal Government to regulate community morals.

Obscenity legislation implements governmental control over the media of communication for the purpose of regulating community morals. Regulation of community morals is, under our federal system, within the jurisdiction of the states. The Federal Government has no authority over local morals—there is no Federal power to control marriage, divorce, adultery, bigamy, or any other of the subjects related to the moral good order of the community. These matters are the concern solely of local government. The Ninth and Tenth Amendments to the Constitution affirm State power over these matters, as to which no power was delegated to Congress.

(b) The Constitution delegates no power to the Federal Government to regulate speech or press.

The original Constitution, proposed to the States by the Constitutional Convention, contained no provisions relating to the rights of speech and press. No authority to regulate speech or press was delegated, and there were no provisions curtailing Congressional authority with respect to speech or press. On the floor of the Convention, a proposal to forbid Congressional interference with freedom of the press was put forward. It was defeated on the ground that it was unnecessary in that "the power of Congress does not extend to the press" (Elliott's Debates, 545 (1854).) This belief was universally accepted by Federalists and anti-Federalists alike in the debates on ratification which ensued. And such universal acceptance must be regarded as a significant accord of the conflicting groups, for there were so few questions upon which they did agree. See Hart, "Power of Government Over Speech and Press", 29 Yale L. J. 410 (1920).

There was no doubt in the minds of the Founders—those who favored the original Constitution as well as those who insisted on amending it—that the limited powers conveyed to the Federal government did not permit Congressional regulation of speech or press. But there were many who foresaw the danger that such authority might be arrogated through a doctrine of implied powers. For this reason they urged immediate adoption of a Bill of Rights.

Thus, Hamilton, justifying the absence of a Bill of Rights said:

> "They [a Bill of Rights] would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more

> than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"
>
> (The Federalist (J. C. Hamilton ed. 1864) 631)

To which Jefferson replied:

> "Very well, I agree with you that the power is not legitimately here, and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the National Government."
>
> (As quoted in Hart, *op. cit.*, p. 412.)

(c) Congress cannot invoke the commerce power, the postal power or the power to regulate imports as a basis for regulating such speech or press.

As stated above, the statute here under attack must be read in the constitutional context of the statutes which forbid the importation of the same matter or its interstate transportation by common carrier. The purport of these three statutes is thus to regulate the rights of speech and press on the basis of the commerce powers and the postal power. Congress has attempted to obviate the absence of express power to regulate, on the one hand, morals, and, on the other, the media of communication, by

construing the specific delegations of commerce and postal powers as permitting such regulation by inference. The scope of the statutes is sweeping and their impact on the rights of free exchange of ideas is profound. Can Congress, thus, by indirection, exercise a power not delegated? The answer appears in the negative.

(1) *The First Amendment was intended to prohibit regulation of speech and press by the Federal Government under any enumerated power.*

It was precisely for the purpose of preventing Federal regulation of the kind here involved that the First Amendment was passed. Exactly this the proponents of the Bill of Rights feared—that the Federal Government might find indirect ways of regulating speech and press although no express power was delegated. Jefferson's observation, that "there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press," Hart, *op. cit.*, 412,—was the foundation of the effort for express limitation of Congressional power. In order to achieve such a precise restriction, Madison presented the Bill of Rights to the First Congress, on June 8, 1789 saying:

> "* * * if all power is subject to abuse, then it is possible that the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done * * *"
>
> (1 Annals of Congress 432)

Answering the argument that a Bill of Rights was unnecessary because the Federal Government was one of enumerated powers Madison went on to say:

> "It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent * * *."

referring as had Jefferson explicitly to the necessary and proper clause (*Id.* at 438).

To guard against the possibility of regulation of speech and press by resort to construction of the enumerated powers Madison stated that:

> "* * * the great object in view is to limit and qualify the powers of Government, by excepting out of the grants of power those cases in which the Government ought not to act * * *" (*Id.* at 437)

And after the House had adopted the restraints on Congressional power prohibiting the Federal Government from abridging freedom of the press, which formed the basis of the First Amendment, Madison said:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of Government." (Id. at 738)

It is thus plain that the purpose of the First Amendment was to prohibit Congress from resorting to any delegated power or "necessary and proper" theory as a basis for authority for regulation of speech or press, and this, of course, is what the words of the First Amendment state as clearly as words can state anything:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Madison, indeed, early had occasion to reiterate this fact, when he said, during the discussion of the Alien & Sedition Acts:

"Under any other construction of the Amendment relating to the press than that it declares the press to be wholly exempt from the power of Congress the Amendment could neither be said to correspond with the desire expressed by a number of the states nor be calculated to extend the ground of public confidence in the Government." (Elliott, The Virginia and Kentucky Resolutions of 1798 and 1799 (1832), as quoted in Hart, *op. cit.*, p. 423.)

(2) *The purpose of the First, Ninth and Tenth Amendments is subverted if speech and press can be regulated by the Federal Government as incidents to exercise of the commerce, postal or importation powers.*

It is apparent that the First Amendment's prohibition becomes meaningless if the power which it most explicitly denies to Congress can be wielded as an auxiliary of one of the enumerated powers. The command of the First Amendment cannot be effective unless it is construed to subtract from each such enumerated power of Congress any authority to regulate speech or press.

It has been recognized since the case of *Gibbons v. Ogden*, 9 Wheat. 1 (1824), that the commerce power is restricted by the "plain terms" of "limitations * * * prescribed in the Constitution." Congress may not in the course of regulating commerce impair the rights of speech or press. *National Labor Relations Board v. Ford Motor Co.*, 114 F. 2d 905, cert. denied 312 U. S. 716 (1941).

Likewise, in *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937), although the majority found no impairment of free speech in the specific situation litigated, the underlying doctrine of Constitutional law which the Court applied was stated by the dissent as follows:

> "* * * Those liberties enumerated in the First Amendment are guaranteed without qualification, the object and effect of which is to put them in a category apart and make them incapable of abridgement by any process of law * * *" (301 U. S. 103, 135)
>
> "The grants of the Constitution always are to be read in the light of the restrictions. Thus, the exercise of the power to make laws on the subject of bankruptcies, the exercise of the war powers, of the power to tax, of the power to exclude aliens, or of the power to regulate commerce, is each subject to the qualified restrictions of the Fifth Amendment * * * as each, also, is subject, so far as appropriate, to the unqualified restrictions of the First," (301 U. S. 103, 136)

It is equally clear that the First Amendment restricts what can be done under the postal power. This Court, in *Hannegan* v. *Esquire*, 327 U.S. 146 (1946), has approved the doctrines expounded by Justices Holmes and Brandeis in dissenting opinions in *United States, ex rel. Milwaukee S.D. Pub. Co.* v. *Burleson*, 255 U. S. 407 (1920):

> "* * * [T]he postal power, like all its other powers, is subject to the limitations of the Bill of Rights * * * Congress may not, through its postal police power, put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in Ex parte Jackson, that 'liberty of circulation is as essential to that freedom as liberty of publishing * * *'" (Brandeis, J., *Id.* at 430.)

and that:

> "The United States may give up the Post Office when it sees fit; but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. * * *" (Holmes, J., *Id.* at 437.)

To the same effect see *Ex Parte Jackson*, 96 U. S. 727 (1877); *Pike* v. *Walker*, 121 F 2d 37, cert. denied, 314 U. S. 625 (1941).

Indeed, early in the history of the Republic, the restriction on the postal power necessarily resulting from the First Amendment was dramatically asserted, when President Jackson asked for a law prohibiting the use of the mails for publications intended to instigate the slaves to insurrection. The Senate refused so to legislate. Senator Calhoun, in the Committee Report said:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * * The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The Committee refer to the amended article of the constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the president * * *"
>
> S. Rep. 118, 24th Cong., 1st Sess. 1-3. (1836)

This view was concurred in by Senators from both North and South (all men raised during the formative period immediately after the adoption of the First Amend-

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IN THE

Supreme Court of the United States

October Term, 1956

No. 258

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

The Interest of the Authors League

The Authors League of America, Inc. is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

We respectfully submit that the statute involved (18 U. S. C. 1461, 1462)—prohibiting the mailing of "obscene" literature—is unconstitutional for the reasons urged by Judge Frank in his concurring opinion. Such prohibitions cannot be reconciled with "opinions of the Supreme Court uttered within the past twenty-five years relative to the First Amendment as applied to other kinds of legislation" (237 Fed. 2d 796, 802). The statute troubled Judge Frank in two respects: first, there is no reasonable probability that obscene publications tend to have any effect on the behavior of normal, average adults; and second, that punishment is inflicted for provoking in such adults undesirable thoughts rather than dangerous or anti-social acts.

We respectfully urge that, for the reasons hereinafter discussed, present judicial interpretations of "obscene" are unconstitutional because unduly restrictive of freedom of expression in their operation; and that it is possible to deal with the problem of "obscene" literature and preserve this freedom.

I.

Present judicial definitions of "obscenity" unreasonably restrict freedom of the press.

> "(For) the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (*Bridges* v. *United States*, 314 U. S. 252, 263)

Realization of the ideal embodied in the First Amendment has until now been frustrated by the necessity of denying protection to certain "well defined and narrowly limited classes of speech," one of which is the "lewd and obscene" (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571). Unfortunately, the "lewd and obscene" has not proven, in operation, to be a "well defined" class of speech.

In theory, everyone might agree that a particular book is so unspeakably filthy, so socially useless, that it should be prohibited. In practice, such a consensus is never reached on any given work; it has proven impossible to reach agreement on the definition and concept of "obscenity" or the purpose of prohibiting it.

Judicial approach to the problem has come, generally, from two directions: the first, represented by the decision in *Besig* v. *United States*, 208 Fed. 2d 142; the second, reflected in Judge Hand's opinion in *United States* v. *One Book Entitled Ulysses*, 72 Fed. 2d 705.

The Restrictive Besig Test

In *Besig*, the Court reiterated a venerable definition of "obscene":

> "* * * the word symbol for indecent, smutty, lewd or salacious references to parts of the human or animal body or to their functions * * *" (208 Fed. 2d at p. 145)

The prohibition is drawn in terms of forbidden themes, indelicate language or treatment, and offensiveness:

> "Yet we risk the assertion that there is an under-

> lying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposely flaunt such delicacy in language generally regarded as indecent come under the ban of the statute." (Id. p. 147)

There is no such "accord," nor would one be consistent with the First Amendment; on the contrary, it would contradict "the very basis of a free society, that of the right of expression beyond the conventions of the day." (*Hannegan* v. *Esquire*, 327 U. S. 146, 160.) This view that speech may be restricted for transgressing standards of delicacy offers a sharp contrast with the concept that the First Amendment "does not speak unequivocally" and is a "command of the broadest scope"; it also stands in utter contradiction of the view expressed by Mr. Justice Jackson in *Board of Education* v. *Barnette*, 319 U. S. 624

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." (pp. 641-2)

As Judge Hand had demonstrated earlier in *Ulysses*, a test drawn in the broad terms of the *Besig* definition indiscriminately outlaws classics and scientific texts, as well as innumerable books, plays and motion pictures of varying degrees of inoffensiveness and literary value—in complete defiance of common sense and the First Amendment. (Cf. *Winters* v. *New York*, 333 U. S. 507, 509.)

The effect of any definition of "obscenity" extends beyond the courtroom to a degree unparalleled in most other areas of the law; particularly when rights of free speech and press are subjected to strong pressures from law enforcement agencies, or from private organizations devoted to making unavailable to an entire community books, plays and motion pictures which offend their respective political, social or religious views.*

In such instances, the very broadness of definition becomes a coercive force, employed by officials to compel booksellers and distributors to discontinue the sale of books which the officials or private groups may find "offensive". The pressures are irresistible because the bookseller has no personal stake in a particular work which would warrant the cost of defending an action or the risk of conviction and possible loss of business; and because the scope of the statute is so wide that no one can predict its application to a particular book, and lastly, because it is applied without the mediating influence of a court.

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* The Report of the Select Committee on Current Pornographic Material (H. R. 2510, 82nd Congress, 2nd Session) contains testimony of a Detroit police officer who reported the complete success of efforts by the Police Department and the District Attorney to induce book distributors in Detroit to discontinue selling all pocket size editions which these agencies believed violated the Michigan Obscenity Statutes. The Police Inspector testified that his department operated "under the State law, insofar as the literature is concerned" (50), that up to the time of his testimony they had not been required to prosecute any pocket sized books in court because "they have always been withdrawn voluntarily" (53), and that the "result has been very gratifying to us because we feel that voluntary censorship on his part is the ideal method of suppression." (54-55).

The Liberal Ulysses Test

The Court of Appeals for the Second Circuit, was in *Ulysses,* sorely troubled by the consequences of prohibiting any work which contained "obscenity" in the dictionary sense; too many great books would fall under such an axe. As Judge Hand noted, many of the classics contained much that would be condemned as "obscene" under any definition (72 Fed. 2d 705, 707).

In an effort to escape these restrictive and unreasonable consequences, Judge Hand held that a work must be considered as an entity and could not be condemned as obscene unless "taken as a whole (it) has a libidinous effect" (72 Fed. 2d 707).

If libidinous effect is to be the test, it would seem irrelevant whether the result were achieved by a book in its entirety or only by portions of it.

Under Judge Hand's test, literary merit becomes significant; "relevancy of the objectionable parts to the theme, (and) the established reputation of the work in the estimation of approved critics, are critical criteria" (72 Fed. 2d 705, 708). But such considerations do not jibe with the holding in *Winters* v. *New York,* 333 U. S. 507, 510, that even "works of no possible value to society . . . are as much entitled to the protection of free speech as the best of literature."

Because the *Ulysses* test represents a far less restrictive approach to the problem than did the concept typified by *Besig,* the Authors League, in *Butler* v. *Michigan,* 352 U. S. , 77 Sup. Ct. 524 urged that the Court accept this definition.

However, *Butler* v. *Michigan*, permitting consideration of the problem uninhibited by concern that a solution would limit the right to protect minors and Judge Frank's opinion, embolden us to suggest that there are other factors which may be considered in determining the boundaries of "obscene" as a "well defined and narrowly limited class(es) of speech."

II.

The clear and present danger test would not provide a constitutionally valid definition of "obscene".

In *Commonwealth* v. *Gordon*, 66 Pa. Dist. & Co. R. 101, it was suggested that a book could be proscribed only upon demonstration "beyond a reasonable doubt" of a causal connection between the book and criminal behavior. Judge Frank believed that the test should be modified by stressing "the element of probability in speaking of a 'clear danger,'" in accordance with *Dennis* v. *United States*, 341 U. S. 494.

However, we submit that this test is not an appropriate one for coping with the problem of "obscene" literature any more than it would be relevant in defining libel or slander. In *Dennis* v. *United States*, the defendants were convicted for uttering or conspiring to utter speech prohibited by the Smith Act. The clear and present (or probable) danger test was not employed to define or describe the prohibited speech; rather it was employed to determine

whether the defendants should be punished for having uttered the speech:

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case." (341 U. S. 494, p. 513)

Here the first question is not whether there is a danger that a specific class of speech will cause a particular punishable result. Rather, it is: what is that class of speech? What is meant by "obscene"?

Even if the probable danger standard were used, it would not provide a definition of the class of speech banned by the statute (or by any state enactment prohibiting "obscene" literature).

If a book is to be banned as obscene whenever there is a probable danger that it would cause "criminal" behavior, then the definition becomes broad (and ambiguous) enough to include anything which is found, as a matter of fact, to provoke the undesirable conduct. There are many stimuli which could produce such conduct, and of these, most do not fall within any current definition of obscenity. (237 F. 2d 812)

Application of the probable danger test would leave the critical issue to be determined by the court: whether the First Amendment protects the "(speech) which constitutes the violation of the statute" (341 U. S. 494, 513). Indeed, all issues would be taken from the jury because "probability of danger" becomes the means of defining "obscenity" and the existence of probable danger "must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case" (341 U. S. at 513).

This consequence is underscored by Mr. Justice Douglas in his dissent in *Dennis* v. *United States*:

> "I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce* v. *United States*, 252 U. S. 239, 244, to be a jury question. Mr. Justice Pitney, speaking for the Court, said, 'Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial'" (341 U. S. 494, p. 587).

If the theory of statutes punishing the obscene is that such speech must be suppressed because it constitutes an incitement to illegal conduct, then the statute here falls for failure to define any such proscribed conduct. Moreover, the ordinary statute punishing incitement would require, for conviction, proof beyond a reasonable doubt that the words used might produce the conduct. It is in connection with such a prosecution, but not in connection

with a prosecution under the instant statute, that the clear and present danger test may have application.

The principal weakness of the probable danger test is that:

> "No one can now show that with any reasonable probability obscene publications tend to have any effects on the behavior of normal, average adults" (237 Fed. 2d 802).

The Appendix to Judge Frank's opinion is most convincing in its demonstration (pp. 806-827) that there is no factual basis for assuming a causal connection between reading "obscene" literature and the behavior of normal average adults. In the absence of conclusive evidence, books should not be condemned, no less defined as obscene, because of a "probability" that they would cause anti-social conduct.

> "So long as this Court excercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'" Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress." (Mr. Justice Black dissenting in *Dennis* v. *United States*, 341 U. S. 494, 580)

It is almost self-evident that an average, normal adult could not be activated by a book to commit a sexual crime or similar act (by definition, any person so stimulated would not be normal). And a statute aimed at proscribing literature or other means of expression to all adults because

of a possible effect upon abnormal or unbalanced members of the community, would be guilty of the same infirmity which was condemned in *Butler* v. *State of Michigan, supra.*

Certainly, neither the trial judge nor the jurors below were so affected by the material mailed by petitioner. Offended, they may have been; compelled to criminal acts, they were not. Indeed, if a jury is representative of the normal adult community, and probable danger were a fact, it would be impossible for them to hear evidence in any case involving obscene literature punishable under Judge Frank's rule.

III.

Freedom of expression should be unequivocally secured so long as it does not destroy the right of privacy.

If there is no reasonable basis for assuming causal connection between "obscene" works and adult behavior, then there is no purpose in considering that relationship in any definition of a class of proscribed speech or press. In fact, most judicial approaches to the problem did not seem to be based upon any real concern for the prevention of possible resulting "conduct."

Rather, efforts by the community against the "obscene" —through statutory action and judicial definition—seem to strive for three objectives.

The first is to prevent impure thoughts—either to compel "respectable delicacy" in accordance with *Besig*, or to prohibit inspiring "libidinous effect", as suggested in

Ulysses. As Judge Frank has stated, restrictions on thought *per se* cannot be reconciled with the First Amendment. A majority of the community may find a particular book, picture or play repulsive because of its "obscene" content and may be shocked by the fact that other adults derive pleasure from such objects, but under the First Amendment these reactions do not furnish a basis for preventing anyone from reading the book, seeing the play, or contemplating the picture.*

The second objective is the protection of minors against corruption by obscene literature. As *Butler* v. *Michigan* indicates, this is a problem which can and should be treated separately and an appropriate definition of "obscene" need not be affected by fear of opening the door to matter dangerous to the morals of children.

Lastly, society strives in its campaign against the "obscene" to allay an underlying fear that without protection, sights and sounds will be forced upon people who do not wish to see or hear them, under circumstances in which there is no opportunity for rejection. In other words, a fear that society, unprotected, would be subjected to literary and artistic "indecent exposure."

We respectfully submit that there are limits within which this purpose can be legitimately secured without restrict-

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* Undue concern for the moral welfare of less fortunately situated members of the community seems to constitute a strong incentive for efforts at suppression. Prosecutions and enforcement campaigns are often directed at cheap paper-backed editions of a novel but not at the more expensive hard cover or "trade" editions which sell at many times the price (Cf. H.R. 2510, 82nd Congress, 2nd Session). Similarly, efforts were made over the years to suppress "burlesque" in large cities, although higher priced entertainment in the theatre and night clubs offered precisely the same "attractions" as did lower priced burlesque.

ing freedom of speech and press; that the purpose can be accomplished by placing the emphasis upon securing the right of privacy rather than on suppression of any form of expression because of its content.

In *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, Mr. Justice Douglas, dissenting, said (at pp. 468-469):

> "The present case involves a form of coercion to make people listen. The listeners are of course in a public place; they are on street cars travelling to and from home. * * * in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command.
>
> "* * * One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel.
>
> "* * *
>
> "One who tunes in an offensive program at home can turn it off or tune in another station as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the street car has no choice but to sit and listen, or perhaps to sit and try *not* to listen."

We submit that these considerations are applicable to the problem of restricting "obscene" speech and press.

Ordinarily, a book is a private matter; its contents are concealed between covers and are available only to those who choose to open and read it. Unless they are forced

upon members of the community, without any choice on their part to hear or reject, there should be no suppression. If, for example, passages from an obscene book were read over a loud speaker, there would be ample basis for punishing that act without suppressing the sale of the book in book stores (Cf. *Kovacs* v. *Cooper*, 336 U. S. at pp. 104-105).

Similarly, the community may be entitled to ban the display in public places, e.g., newsstands and stores, of magazine covers containing pornographic illustrations or pictures; or the posting in public places of billboards containing obscene photographs advertising motion pictures or plays. In either circumstance, the State would have a legitimate interest in protecting the right of its citizens not to be exposed to obscene sights (or sounds) on public places. However, no purpose would be served in suppressing the sale of the magazine because of its contents, or the motion picture thus advertised because of its dialogue or subject.

The same considerations applicable to literature should apply to motion pictures, the stage, and other media of communication and entertainment. No adult is compelled to see a motion picture or a play; and in that sense these media do not involve invasion of privacy any more than books do.

However, the chief distinction between these media is that books only involve speech, whereas motion pictures and plays employ both speech and action. Concern has been expressed that theatre audiences might be exposed to acts (as distinguished from words) which were obscene. This should not present any problem, since acts could be pro-

scribed if they constituted indecent behavior or exposure, without impairing freedom of expression.

In *Public Utilities Commission* v. *Pollak,* 343 U. S. 451, Mr. Justice Douglas (dissenting) said at page 469:

> "The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds."

We are respectfully suggesting here that people should be "let alone in those choices" for as Mr. Justice Douglas has declared:

> "The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy." (dissenting in *Dennis* v. *United States,* 341 U. S. 494, 590)

That maturity of judgment is not a myth; its soundness has already proven effective in several areas of speech and press. Books published in regular or "trade editions" compete for public approval solely on the basis of merit. Success results from critical acclaim; and seldom is an effort made to exploit in suggestive or sensational manner the contents of books. Almost invariably, advertisements

contain only the title, the names of the author and publisher, and occasionally excerpts from reviews.

Similarly, the legitimate theatre makes its appeal to the public on the basis of merit. Theatrical advertising is limited in the same manner; and the public makes its choices as a consequence of the nature and content of plays, the reactions of the critics and the general public.

We respectfully submit that the problems of prohibiting the "obscene" have been overly complicated by a reluctance to trust the judgment of individual members of the community and to recognize the essential fact that taste (and sensual reactions) cannot be determined by legislation:

> "For indecency and vulgarity the fundamental remedy is the culture of audiences and readers, and the protests of critics. Jeremy Collier cured the profaneness and immorality of Restoration drama without any official authority. But the censorship, established not to clean up the stage, but to muzzle Henry Fielding, one of the greatest of British authors, made the theatre the most stagnant cultural institution in the country." (G. B. Shaw, "*Everybody's Political What's What?*", pp. 198, 199).

CONCLUSION

It is respectfully submitted that the conviction should be reversed.

Respectfully submitted,

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